

Consultation on Giving Children and Young People a Right to Appeal

A consultation on giving children and young people a right to appeal decisions regarding exclusions, SEN statements and assessments and to make disability discrimination claims in England.

Summary

In line with the Government's commitment to give young people more say in the processes and decisions that affect them, this consultation seeks the views of children and young people, parents, carers, governing bodies, local government, school staff, teaching and support staff unions (including professional bodies), Tribunal and independent appeal panel members, associated representative organisations and the voluntary sector on:

- the principle of giving children and young people ages 16 and over the right to appeal a decision to permanently exclude them from school;
- the principle of giving children and young people the right to appeal special educational needs (SEN) statements and assessments and to make claims concerning disability discrimination; the age at which young people should be able to do so; and the level of understanding required by children and young people to effectively exercise these rights, and whether a competency measure is required;
- whether existing systems are sufficient to support children and young people in exercising these rights, and the new right of young people to appeal a decision on admission from the age of 16;
- handling disagreement between parents, children and young people about appeals; and
- how looked after children can be better supported to avoid or manage permanent exclusion within the secondary school environment.

This consultation will run for 12 weeks. Subject to the outcome of the consultation and the available funding, the Government will seek to introduce revised arrangements for young people's appeals, and, where appropriate, to legislate to introduce the new arrangements.

department for
children, schools and families

Consultation on Giving Children and Young People a Right to Appeal

A Consultation

To Child or Young Person, Parents, Carers, Governing Bodies, Local Government, School Staff, Teaching and Support Staff Unions, Tribunal and Independent Appeal Panel Members, Associated Representative Organisations, Voluntary Sector

Issued 28 April 2009

If your enquiry is related to the policy content of the consultation you can contact the Public Communication Unit on

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1 Introduction

- 1.1 The Government is exploring ways of increasing the participation of children and young people in the processes and decisions that affect them. This is in line with the drive to give young people responsibility for their own actions. Through the Education and Skills Act 2008, we have already given young people aged 16 and over the right to appeal decisions on admissions, and since September 2007 pupils have had the right to comment on their school's behaviour and discipline policy.
- 1.2 However, in the areas of permanent exclusion special educational needs (SEN) statements and assessments and disability discrimination claims, the right to appeal or to claim lies with parents (although pupils aged 18 or over also have the right to appeal a permanent exclusion). This consultation seeks views on giving children and young people the right to appeal, and on the support they may need to do so. It also asks what, if any, additional support is needed to help children and young people through the appeals process, including appeals on admission decisions. Definitions used for the purpose of this consultation are set out at the back of the document.
- 1.3 While this consultation is focused primarily on the areas for **appeal**, it takes place more generally within the context of the recent consultation on handling parents' and young people's **complaints** about individual school issues, including behaviour, bullying, curriculum and disciplinary

processes. The report *A New Way of Handling Parents' Complaints about School Issues*¹, published on 4 February, sets out the outcome of, and the next steps in, the complaints consultation.

1 - www.dcsf.gov.uk/consultations/index.cfm?action=nResultsId%70&external=&menu=br />

2 Executive Summary

- 2.1 The Government is committed to giving young people a greater say in decisions that affect them and to ensuring fairness and equality for young people and children.
- 2.2 The UN Convention on the Rights of the Child (UNCRC) includes rights for children to express their views on matters that affect them where they have the maturity to do so. The UN Committee on the Rights of the Child recommended that the UK ensure that those children who are able to express their views have the right to appeal their exclusion from school, as well as the right, particularly for those in alternative care, to appeal to the First-tier Tribunal (Special Educational Needs and Disability, SEND).
- 2.3 This consultation responds to Ministers' concerns that young people should have more of a say in the key appeals process they may face during their time in secondary education.
- 2.4 The consultation seeks views on:
 - the principle of giving children and young people aged 16 and over the right to appeal a decision to exclude them permanently from school, in line with the new admission appeals age;
 - the principle of giving children and young people the right to appeal local authority decisions on SEN statements and assessments, and to make claims concerning disability discrimination; the age at which young people may do so; and the level of understanding required by children and young people to effectively exercise these rights, and whether a competency assessment should play a part in this right to appeal;
 - whether existing systems are sufficient to support these children and young people in exercising these rights and the new right of young people aged 16 and over to appeal a decision on admission;
 - handling disagreement between parents, children and young people about appeals; and

- how looked after children can be better supported to avoid or manage exclusions within the secondary school environment.

- 2.5 The consultation is open to all. However, we particularly seek the views of children and young people, parents, carers, governing bodies, local government, school staff, teaching and support staff unions (including professional bodies), Tribunal and independent appeal panel members, associated representative organisations and the voluntary sector.
- 2.6 For appeals on permanent exclusion, the consultation will explore giving the right to 16 and 17 year olds and the support they may need to exercise this right. Looked after children are particularly vulnerable, and we also seek views on the best way to support them in order to avoid and manage permanent exclusions.
- 2.7 For appeals on local authority decisions on SEN statements and assessments and on the right to make a claim of disability discrimination, the consultation will explore the issue of widening who may appeal and from what age, and seeks views on the support and competency that may be needed to enable children and young people both to understand and to exercise their right. It will also explore the support that may be needed.
- 2.8 In addition, we are exploring the support that young people aged 16 and over may need to exercise their right to appeal an admission decisions, following the recent Education and Skills Act 2008, which established that right.
- 2.9 These proposals are for England and will not replace the existing rights of parents or carers. We would still expect appeals to be generally taken forward by parents and carers, with young people or children exercising their individual right only if the parent or carer is unable or unwilling to do so. We are not proposing to add any additional stages to the appeals process.
- 2.10 We welcome the support of partners in exploring the ideas within the consultation, particularly with children and young people, parents and carers and representative bodies and groups. The outcome will be published within three months of the end of the consultation.

3 Background and the Case for Change

- 3.1 The Government is committed to listening to and considering, the views and opinions of children and young people. Through the Every Child Matters programme, the Government is committed to ensuring the

participation of children and young people in shaping the services that affect their lives.

- 3.2 There are compelling reasons for extending the right of appeal and to make disability discrimination claims to children and young people. First, the difference in approaches to the right of appeal across policy areas and across the UK was highlighted recently when the UN examined the UK on its progress against the UNCRC. The Convention includes the right of children to express their views on matters that affect them, and states that their views should be given due weight in accordance with the age and maturity of the child. The UN Committee on the Rights of the Child recommended that the UK 'ensure that children who are able to express their views have the right to appeal their exclusion as well as the right, in particular for those in alternative care, to appeal to special educational need Tribunals'.
- 3.3 Second, the rights would provide an additional safeguard to ensure that the needs of children and young people are considered. Current arrangements rely on the presumption that statutory agencies will be competent in their practice and administration, and that parents will act to promote the best interests of their children. There may be potential hazards for some children and young people if one or both of these essential ingredients are missing.
- 3.4 In addition, the approach will reduce concerns that some parents, even with support, simply do not feel willing or confident/competent enough to pursue an appeal themselves. In these situations, there is a risk that the educational needs of the child might not be fully addressed.
- 3.5 Furthermore, the proposals on making disability discrimination claims will explore the issue of bringing the approach into line with other equality strands, such as race and sex. Currently, disability is the only equality strand where a claim that relates to discrimination against a school pupil must be brought by the pupil's parent or legal guardian.
- 3.6 In Wales and Scotland, children and young people already have the right to appeal their permanent exclusion at the ages of 11 and 12, respectively. To date, we have no substantive evidence from the devolved administrations that young people have taken the opportunity to appeal, although these provisions have been in force in Scotland since 2000 and in Wales since 2004. The majority of appeals are still taken forward by parents.
- 3.7 In Scotland, children and young people already have the right to appeal to the Additional Support Needs Tribunal over co-ordinated support plans

(roughly equivalent to SEN statements) from the of age 16, and the right to appeal disability discrimination cases relating to school discrimination to the Sheriffs Court from the age of 12. In Wales, the outcome of the recent consultation *Voices and Choices*² was published in January, and new measures were announced on 27 April 2009.

2 - <http://new.wales.gov.uk/consultations/closedconsultations/education/voicesandchoices/?lang=>

4 The Scope of the Consultation

4.1 The proposals set out in the consultation relate to:

- England only;
- appeals on SEN statements and assessments and disability discrimination claims made to the First-tier Tribunal (SEND); and
- permanent exclusion appeals to the independent appeal panel.

4.2 Exclusions, SEN appeals and disability discrimination

Existing statutory guidance in relation to exclusion appeals encourages the child or young person to attend appeal panel hearings and to give their views if they wish, subject to their age and understanding of the proceedings. For appeals about SEN statements and assessments, local authorities must submit to the Tribunal the views of children and young people (or explain why they have not done so), and children and young people have the right to attend the Tribunal unless there are valid reasons for them to be excluded.

- 4.3 Our assumption is that the parent would normally continue to be the person who makes the appeal, and that the right of the child or young person to appeal would only come into play in a small number of cases, where the parent is unable or unwilling to appeal. So, at any stage of appeal, the relevant authorities (e.g. schools, Academies, independent appeal panels, First-tier Tribunal), need to consider how to engage the child or young person if the parent chooses not to appeal or is unable to do so to ensure that the child or young person knows of their right and how to take it forward.
- 4.4 It is our expectation that there would only be one appeal per case. If a parent chooses to exercise the right to appeal, then it will not be necessary for the child or young person to appeal as well. Nor do we feel

that it would be helpful for a child to be able to re-appeal their permanent exclusion or a decision on their SEN statement or assessment, or to make a further disability discrimination claim, if their parent has already appealed unsuccessfully.

- 4.5 There is a risk that giving a child or young person the right to appeal could lead to parents believing that the child or young person has a better chance of winning their case, and they may therefore opt for the child or young person to appeal instead. However, this would not be the case: whether the appeal is brought by the parent or the child, we would expect the appeal panel to have regard to the same evidence in reaching its final decision. We would welcome views on how panels, in their enabling role, may help a child to manage their appeal well.

- 4.6 There is also a risk of conflict arising between a child or young person and their parent, should they disagree over whether or not to appeal. If a parent chooses not to appeal, but the child or young person wishes to do so, both parties should have a discussion before reaching a decision. If agreement is not possible, we would expect either party to be able to exercise their right to appeal individually. We do not believe there is merit in giving the parent an overriding power (i.e. one where they can overrule their child's decision to appeal), since this would negate the point of giving pupils under 18 an individual right to appeal.

4.7 Support for appeals

While giving children or young people a right of appeal is not expected to affect the overall number of appeals significantly, it could affect the costs associated with the appeal if additional support is provided to help the child or young person through the process. However, we do not believe there to be a case for providing additional support in the case of exclusion appeals. We would welcome views on the type of support needed for making appeals about local authority decisions on SEN statements and assessments, and for making disability discrimination claims.

- 4.8 Legislative changes under the Education and Skills Act 2008 gave children and young people the right to appeal admission decisions from the age of 16. This followed a wide-ranging public consultation during summer 2008 on a revised School Admissions Code, revised School Admission Appeals Code and related Regulations, and responded to the Department's commitment in the Children's Plan (published in 2007) to improve the application and allocation system for school places, in particular for parents and vulnerable groups.

- 4.9 This consultation will now consider what additional support such young

people may need through the process of appealing.

4.10 Looked After Children

We are equally concerned about ensuring effective support for looked after children, given the recognised vulnerability of this group. Under the Department's Care Matters programme,³ which is currently being implemented, looked after children will benefit from an even greater opportunity to have their voices heard. The role of the independent reviewing officer will be strengthened, and from autumn 2009, there will be a statutory requirement for all maintained schools to have a designated teacher for looked after children and for this role to be stipulated in the model Academy Funding Agreement.

3 - <http://www.everychildmatters.gov.uk/socialcare/childrenincare>

- 4.11 Looked after children are more likely to be permanently excluded than are their peers, and we would welcome views on how best to support the interests of looked after children and care leavers, who typically live apart from their parents, in avoiding and appealing a permanent exclusion. In particular, we would welcome views on whether local authorities, as corporate parents, are well positioned to support looked after children in exercising a right to appeal.

5 The Current Position and our Proposals

5.1 Permanent exclusions

Existing legislation gives pupils aged 18 or over and parents (where the pupil is under 18 years of age) a right of appeal in cases of permanent exclusion. The appeal offers an opportunity to review the decision made by a governing body and a head teacher. Of 8,860 permanent exclusions in 2006/07 in England, a total of 1,050 appeals were lodged in 2006/07, and 970 were heard by independent appeal panels. This represented around 11% of all permanent exclusions⁴ – a rate that has been relatively stable in recent years. However, the overall rate of permanent exclusions fell by 7% from that in 2005/06. In the case of permanent exclusion, existing statutory guidance encourages pupils, subject to their age and understanding, to participate fully in their exclusion proceedings. This can include giving their views to the head teacher, attending governing body meetings and appeal panel hearings, and speaking, if they so wish. However, there is no right of appeal for a child, and only a parent and

pupils aged 18 or over have such a statutory right.

4 - DCSF Exclusions: <http://www.dcsf.gov.uk/rsgateway/DB/SFR>

- 5.2 Independent appeal panels are informal and independent of the school, working within the principles of fairness, transparency and natural justice. Panel members are trained, and at least one member should have experience in the relevant education area – primary or secondary school. Independent appeal panels allow parents to appeal their child's permanent exclusion without going to court.
- 5.3 The Government is keen to explore ways of extending the right to appeal a permanent exclusion to young people in England in line with the admission appeals age, and to address the specific concerns of the UN Committee on the Rights of the Child in relation to exclusions. Giving a young person the right to appeal their permanent exclusion will represent an important demonstration of children's rights.
- 5.4 In 2000, Scotland gave children and young people with legal capacity (usually age 12 or over) the right to appeal their exclusion from school. Wales gave pupils aged 11 or over a right of appeal in 2004. In both systems, parents and pupils aged 18 or over also have a right of appeal. There were 264 permanent exclusions in Scotland in 2005/06 and 26 appeals; and in 2006/07 there were 248 permanent exclusions and 18 appeals. However, in Scotland the majority of appeals are still made by parents. The figures in Wales for the same period (2005/06–2006/07) show a total of some 450 permanent exclusions. Wales does not routinely collect appeals data, but have indicated that no appeal has been brought by children. Neither of the devolved administrations has reported evidence of any vexatious appeals by children or young people, and nor have they established a national advocacy service to support children or young people. It is therefore likely that changes in England to give young people a right to appeal would have a similar impact, with parents remaining the main appellants.
- 5.5 Within England, young people over the age of 16 tend to be presumed competent to make their own decisions on matters that affect them. It is for this reason, coupled with the fact that there have been very few exclusion appeals brought by young people or children in Scotland and Wales, that we propose introducing an appeal age of 16 for permanent exclusion. This age is also consistent with the new admissions age, which came into force in February 2009 for admissions from September 2010. In addition, 16 year olds will have the right to exercise a preference for a

school. Current statutory guidance on exclusion allows children, subject to their age and understanding, to attend appeal hearings and give their views.

- 5.6 Exclusions from Academies operate in much the same way as from maintained schools. The exclusions annex of each Academy's Funding Agreement (the contract between the Academy Trust and DCSF) describes the Academy's duties with regard to exclusions (the appendix provides the current model annex dealing with exclusions from Academies).
- 5.7 We believe that the current system for appealing a permanent exclusion is sufficiently open and clear and should not need amendment for young people to use. At present, local authorities are responsible for establishing and managing exclusion appeal panels if a pupil in a maintained school has been permanently excluded, and for meeting all the costs involved, including providing a clerk and paying allowances to panel members where appropriate. Local authorities are currently required to supply parents with information about the appeals process, and this information could be adapted to meet the needs of the young person. In Academies, the costs and obligations would fall upon the Academies themselves. With the experience in Scotland and Wales, we do not expect there to be a significant number of additional cases from young people. Therefore, we do not envisage increased costs for local authorities, but we would welcome views.

Q1: Do you agree that a young person should be able to appeal their permanent exclusion from school at ages 16 and 17?

Q2: Do you think that a leaflet or guidance note aimed at young people explaining how they can appeal their permanent exclusions would be helpful?

Q3: Do you consider that there is sufficient support currently in the system to support a young person through the process of appealing?

Q4: What type of support might a young person need to make an appeal?

Q5: Will vulnerable young people require additional support? If so, what would that be?

5.8 Looked After Children

The right to appeal at ages 16 and 17 would include looked after children.

However, given the vulnerability of this group, we wish to explore whether they should be offered additional support by the local authority at an earlier secondary school age to help them avoid and/or to appeal a permanent exclusion. Just 13% of looked after children achieve five GCSEs at grades A* to C – a figure that is well below the average for their age cohort. Some 45% of looked after children have a mental health difficulty, and looked after children are 10 times more likely to have a statement of SEN than the cohort average.

Q6: What support would best help a child living with foster carers or in a children's home to avoid or appeal a permanent exclusion?

Q7: Is the existing guidance for looked after children – that exclusion should only be used as a last resort – being implemented effectively?

Q8: What should the Independent Reviewing Officer be doing in order to ensure that the wishes and feelings of the child/young person are taken into account by the local authority?

Q9: Within the context of its duty to promote the educational achievement of the children it looks after, what other services should a local authority provide to prevent these young people from being excluded from school, including support for foster carers and children's homes?

Q10: Is it sufficient to strengthen the local authority role in preventing exclusions, or are changes in legislation required to give looked after children of secondary school age the best chance of reducing permanent exclusion?

- 5.9 If there is any change to legislation that extends the age for appeals, we would expect any appeals by looked after children to be funded by local authorities, in line with their existing responsibilities towards these young people. However, we would welcome views.

5.10 **SEN assessments and statements and disability discrimination**

Currently only parents or those with parental responsibility can appeal or make a claim to the First-tier Tribunal (SEND) – formerly the Special Educational Needs and Disability Tribunal (SENDIST). This is set out in primary legislation, in sections 325, 326 and 329 of the Education Act 1996, and section 28I of the Disability Discrimination Act 1995, as inserted by the Special Educational Needs and Disability Act 2001. Parents can both appeal SEN assessments and statements and make disability discrimination claims to the First-tier Tribunal (SEND). No child or young person of any age can appeal or make a claim – including

looked after children whose carers, and the local authority looking after them, may be less willing to appeal or claim on their behalf. Any decision to give children or young people the right to appeal or to make a claim would require legislation.

- 5.11 However, children currently do have the right to attend First-tier Tribunal appeal hearings, though they may be excluded from all, or part of a hearing, if their presence might make it difficult for a witness to give evidence.
- 5.12 On the SEN side, parents can appeal:
- a local authority decision not to assess the SEN of a child or young person;
 - a refusal to reassess a child or young person;
 - after assessment, a decision not to draw up a statement;
 - the contents of, and amendments to, Parts 2, 3 and 4 of a statement (Part 2 describes the child's SEN, Part 3 describes the special educational provision required to meet the needs of the child or young person, and Part 4 names the school where the child will be educated or 'education otherwise');
 - a decision not to name a school in Part 4;
 - a decision not to amend Parts 2, 3 or 4 after reassessment of the child;
 - following a request to do so, a decision not to replace the name of the school in Part 4 with the name of a maintained (state) school which must be of the same type as the school already named, whether mainstream or special; and,
 - a decision to cease to maintain (withdraw) a statement.
- 5.13 On the disability discrimination side, parents can make a claim to the First-tier Tribunal on the grounds of disability discrimination in respect of:
- admissions⁵ to independent and non-maintained special schools;
 - permanent exclusion from independent and non-maintained special schools;
 - fixed-period exclusion from maintained, independent and non-

maintained special schools; and

- discrimination in relation to education and associated services.

5 - Appeals against refusal of admission to, or permanent exclusion from, maintained schools are made to local authority panels.

- 5.14 Legal Help is currently available to parents to help them prepare for the Tribunal. Children or young people with SEN statements are often vulnerable, and might need more support.
- 5.15 In 2007/08, First-tier Tribunal (SEND) data⁶ show that 3,392 appeals were registered, with some 1,040 going through to a hearing and having a decision issued. Of those cases that reached a full hearing and where a decision was sought about the content of the statement, 80% of the parents had their appeal upheld in full or in part.

6 - SENDIST Annual Report 2007-08: www.sendist.gov.uk/FormsGuidance/annualReports.htm

- 5.16 In 2007/08, 145 disability discrimination⁶ claims were registered, and some 80 went through to a hearing with a decision being made. Of the claims decided in 2007/08, 54% were upheld.

6 - See 6 above

- 5.17 Whilst, in Scotland, 16 and 17 year olds have the right to appeal to the Additional Support Needs Tribunal over co-ordinated support plans, there have been just seven appeals over four years. Although the cases are not directly comparable, we can take the statistics from Scotland as indicative.
- 5.18 Local authorities have to submit to the Tribunal the views of the child or young person concerning the issues raised by an appeal. Should a local authority not do so, it is obliged to set out the reasons why.
- 5.19 **The age at which an appeal might be made and competency measures**

The right of children or young people to appeal to the Tribunal on SEN assessments and statements may need to be qualified. Disabled children

or young people and those with SEN can vary widely in their ability to make a competent decision, fully understanding the consequences and responsibilities. For example, an 18 year old pupil with severe learning difficulties may not be competent to make an appeal, whereas an 11 year old with dyslexia may be. A competency test is another way in which rights may be qualified.

- 5.20 Essentially, competency means the ability of a child or young person to be aware of their circumstances and to be able to recognise the choices available to them. Depending on the nature and consequences of a decision, a test of competency might also depend on the ability of a child or young person to weigh up the consequences of a decision to act in one way or another. Competency cannot usually be determined in isolation from a young person's context, or without knowing what information has been made available to them.

Fraser guidelines/Gillick competence

The term arises from the Victoria Gillick case in the early 1980s. Gillick mounted a legal challenge, attempting to set a legal precedent, which would have meant that medical practitioners could not give children or young people under the age of 16 treatment or contraceptive services without parental permission.

The challenge was successful in the Court of Appeal, but then the House of Lords ruled that children or young people who are under 16 are competent to give valid consent to a particular intervention if they have sufficient understanding and intelligence to enable them to understand fully what is proposed and are capable of expressing their own wishes. Lord Fraser of Tullybelton gave the leading judgement in the House of Lords, hence the reference to the Fraser guidelines.

The Fraser guidelines stress that:

- the child or young person must understand the advice being given and must indicate that they cannot be persuaded to involve their parents;
- the child or young person would be likely to continue to have sexual intercourse with or without advice or treatment;
- the professional must be satisfied that if the child or young person does not receive contraceptive advice or treatment their physical or mental health, or both, will suffer; and

- the child or young person's best interests require the professional to give the contraceptive advice or treatment, or both, without parental consent.

Implicit consent means that the person has been informed of the information that is to be shared, the purpose of sharing and the fact that they have the right to object, and that their agreement to sharing has been signalled by their behaviour rather than orally or in writing. Implicit consent can also be inferred from earlier explicit consent, provided there is no change in the relationship with the organisation and the use of the information.

Informed consent means the person giving the consent understands why particular information needs to be shared, what information might be shared, who will use it and how, and what might happen as a result of sharing or not sharing the information.

- 5.21 Article 12 of the UNCRC establishes the principle of a right of expression for children. At the same time, however, it also qualifies this right by limiting the duties of responsible authorities to a 'child capable of forming his or her own views'. This may suggest another potential competency test. In this case, provided a child is able to form views about the subject of a potential appeal, then that child will be competent to exercise that right and should be given the opportunity to do so. Article 12 goes on to say that the weight to be given to a child's views will depend on the 'age and maturity of the child' but that should not be a bar to making the appeal in the first place.
- 5.22 For the purposes of the consultation on appeals about local authority decisions on SEN statements and assessments and on making disability discrimination claims, we ask if the eligibility should be based on the age of secondary school education or on some other set age within the secondary school age range, and whether or not this should be additionally dependent upon their individual competency.
- 5.23 Some children within the SEN and disabled children's cohort are at risk of missing out if their access to appropriate education is restricted. In the case of admissions and exclusions, arrangements are in place for children to receive an appropriate education whether or not appeals are taken forward on their behalf. However, if an appeal to the Tribunal is not made, children with SEN may not be provided with an appropriate education that meets their needs. This could seriously impede their educational progress. Therefore, we wish to explore ways of giving a wide range of secondary school age children the opportunity to appeal themselves, if

their parents (or those with parental responsibility for them) are unwilling or unable to make an appeal on their behalf. We suggest that the child or young person would need to be at least 11 years of age to bring an appeal to the First-tier Tribunal (SEND), and we recognise that more support may be needed for younger children.

- 5.24 Whatever form the test for competence takes, it will need to recognise and accommodate a wide range of ways in which children may choose to express themselves. This will ensure consistency with Article 13 of the UNCRC, which states that the child: 'shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or in print, in the form of art, or through any other media of the child's choice'.
- 5.25 If we decide to use a competency test to judge whether a child or young person is ready to make their own appeal on a SEN assessment and statement or to make a disability discrimination claim, then it will also be important to decide who will make that judgement, and we would welcome views on this.

Q11: Do you agree that children and young people should be able to appeal decisions on SEN statements and assessments and make disability discrimination claims to the Tribunal?

Q12: What would be the appropriate age for a child or young person to make such an appeal or claim? Options include:

secondary school age;

12 and above as for disability discrimination claims, as in Scotland; or

16 and 17 as for additional support needs (SEN) appeals in Scotland and as for admissions in England.

Q13: Should a competency test be applied, and in what circumstances?

Q14: If using a competency test, who should make this judgement and what measures of competency should be used?

Q15: Is there sufficient support currently in the system to help a child or young person through the process of appealing or making a claim of disability discrimination and to attend First-tier Tribunal hearings?

Q16: What support do you think children and young people would need to help make these appeals and claims?

- 5.26 While there may be some additional costs due to an increased demand for legal help to assist children and young people in preparing their case, we would expect this to be minimal, given the low number of child-led appeals anticipated. We therefore expect that the costs of legal help will not increase significantly, but we would welcome views.

5.27 Resolving disputes

Each local authority has to make dispute resolution arrangements available to parents. These can be used to resolve disputes before they get to the Tribunal. Both the parents and the local authority must be willing to use the dispute resolution arrangements; and even when they are used, this does not prevent parents from subsequently going on to the Tribunal. Local authorities also have to make parent partnership services available to parents, to provide factual advice and guidance to the parents of children or young people with SEN. We would expect the suitability of these services for young people to be explored.

- 5.28 Conflicts between parents and children over whether to appeal or make a claim could be complicated in a greater proportion of cases involving children with SEN and disabilities by the child's lack of understanding of what is involved in appealing and making claims. Local authorities may need to make use of alternative formats and easy-read versions, in order to make some children with learning difficulties and disabilities aware of their right to appeal or make a claim.

5.29 Support for appeals on admission decisions

Parents have a statutory right to appeal about admission decisions 'to the school at which education is to be provided for the child or young person in the exercise of the authority's functions' (section 94 of the Schools Standard and Framework Act 1998 (SSFA 1998)). The Education and Skills Act 2008, which received Royal Assent on 26 November 2008, made changes to the law relating to sixth-form appeals. It inserted two new sections into the SSFA 1998 (sections 86A and 86B of the SSFA, inserted by section 136 of the Education and Skills Act 2008) to enable children or young people to appeal about decisions refusing them access to a school sixth form from age 16, or, in the case of young people over compulsory school age, to a school to receive education other than sixth-form education. These new rights are in addition to the rights of the parents of the young person to express a preference concerning the school at which they wish the young person to receive education. Parents still have responsibility for applying and appealing for a school place for children below the age of 16.

- 5.30 This change in the law came into force on 10 February 2009 and applies to applications for school places made for admission in September 2010. Section 94 of the SSFA 1998 has also been amended (by section 138 of the Education and Skills Act 2008) to give a corresponding right of appeal to a young person who expresses a preference for a school place under the new regime. This right of appeal will enable young people to appeal decisions in relation to applications for admission to schools in the academic year 2010/11 and subsequent years.
- 5.31 Local authorities and admission authorities are required to give young people or their representatives appropriate guidance and information before their hearing, to enable them to prepare their case for appeal. Choice Advice is an independent service provided by local authorities to support parents who are most likely to struggle with the admissions system. It is good practice for Choice Advisers to provide support during the appeals process, particularly to those parents who accessed Choice Advice at the application stage. The Advisory Centre for Education is an advisory body providing free advice to parents on admission appeals and exclusions.

Q17: Is there sufficient support currently in the system to support a child through the process of appealing?

Q18: Do you think young people would need support to appeal about an admission decision? If so, what kind of support would be needed?

Q19: Will vulnerable young people require additional support? If so, what would that be?

6 Regulatory and Equality Impact Assessments

- 6.1 Financial and equality impact assessments have been prepared to support this consultation. These are published alongside this document on the DCSF Consultation website.

Q20: Do you agree with the costs and impacts set out in the impact assessments? Further evidence from stakeholders is welcome.

7 Next Steps

- 7.1 Following this consultation, the Department will consider the responses and take appropriate further action to reflect the available funding. This could include revisions to existing regulations or new legislation. It is likely that different policy areas – exclusions, SEN and disability discrimination – will have different implementation dates, approaches and age ranges.

Ofsted will be carrying out a review of SEN beginning in April and finishing in 2010. We will ensure that its review takes into consideration the findings of this consultation.

8 Definitions

8.1 Definitions

The following are offered as definitions for the purpose of this consultation:

Disability: A physical or mental impairment that has a substantial and long-term adverse effect on the ability of a child or young person to carry out normal day-to-day activities.

Fixed-period exclusion: Where a pupil is suspended temporarily, on disciplinary grounds, from going to school, but can return at the end of the suspension period.

Looked after children: Children are 'looked after' if they are provided with accommodation by the local authority under a voluntary agreement with the parents or are the subject of a care order under provisions in the Children's Act 1989. Most looked after children live with foster carers. However, some looked after children live in children's homes or, in certain circumstances, with friends, relatives or their birth parents.

Permanent exclusion: Where a pupil is expelled from a school on disciplinary grounds and their name is removed from the school roll. The pupil will no longer be allowed to attend that school.

Special educational needs (SEN): A child has SEN if he or she has a learning difficulty that requires such special educational provision to be made which is additional to, or otherwise different from, the educational provision made generally for children of that child's age in schools maintained by the local education authority.

SEN appeal: An appeal to the First-tier Tribunal in relation to the local authority's decision on whether to assess children with more severe or complex SEN, whether to draw up 'statements', and the contents of those statements.

9 Appendix: Current model Academy Funding Agreement annex dealing with exclusions

9.1 Serious incidents of misbehaviour leading to fixed period or permanent exclusion

General duties

1. Subject to the exceptions in paragraph 4, the Academy Trust shall act and shall ensure that the principal shall act in accordance with the law on exclusions as if the Academy were a maintained school. For this purpose, reference in the law on exclusions to the head teacher and governing body shall respectively be deemed to be the principal and governing body of the Academy Trust.

2. Without limiting the generality of paragraph 1, the Academy Trust shall ensure that the local authority is informed of an exclusion decision in the same circumstances as required by maintained schools under the law on exclusions.

3. Subject to the exceptions in paragraph 4, the Academy Trust shall ensure that, in carrying out their functions, the principal, the governing body and the independent appeal panel (established in accordance with paragraph 5) have regard to the Secretary of State's guidance on exclusions⁷, as if the Academy were a maintained school.

4. The exceptions to the duties imposed under paragraphs 1 and 3 are:

- the Academy Trust, and not the local authority, is responsible for making arrangements for independent appeal panels to hear appeals on permanent exclusions where the governors do not direct reinstatement;
- the governing body is not expected to seek the advice of a local authority officer when considering an exclusion, although a local authority officer may attend any meeting to consider an exclusion at the request of a parent; and
- subject to the Academy Trust's obligations under clause 52 of this Agreement relating to an agreement with the local authority on the flow of funds following an exclusion, the arrangements for money to follow pupils who have been permanently excluded from school does not apply.

Independent appeal panels

5. The Academy Trust shall, in relation to the Academy, carry out the functions assigned to the local authority to establish and manage the

appeal procedure for exclusions under the law on exclusions, as if the Academy were a maintained school.

6. Independent appeal panels must be impartial and constituted in accordance with the detailed provisions of paragraphs 95–97 of the Secretary of State's guidance on exclusions. The Academy Trust shall arrange suitable training for appeal panel members and clerks.

7. The independent appeal panel's decision is final and binding on the Academy Trust. A parent may seek a judicial review of an independent appeal panel's decision. A parent may not, however, appeal to the Commissioner for Local Administration (the Local Government Ombudsman) about maladministration because the commissioner's remit is limited to considering the conduct of appeal panels constituted by local authorities.

7 - References in this annex to the Secretary of State's guidance are to 'Improving behaviour and attendance: guidance on exclusion from schools and pupil referral units', which is published on the DCSF website at: www.teachernet.gov.uk/wholeschool/behaviour/exclusion/2008guidance/. The guidance may be subject to amendment, and the Academy is required to have regard to the guidance as it stands at any given time.

10 How To Respond

10.1 Consultation responses can be completed online at www.dcsf.gov.uk/consultations

by emailing ypappeals.consultation@dcsgsi.gov.uk

or by downloading a response form which should be completed and sent to:

Consultation Unit, Area GB,
Castle View House, East Lane,
Runcorn, Cheshire, WA7 2GJ.

11 Plans for making results public

11.1 The results of the consultation and the Department's response will be published on the DCSF e-consultation website in autumn 2009.

12 Additional Copies

- 12.1 Additional copies are available electronically and can be downloaded from the Department for Children, Schools and Families e-consultation website at:
www.dcsf.gov.uk/consultations